THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case Nos. 00-CP-23-3752, 3753, 4171

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of all others similarly situated, ... Petitioner,

v.

The Department of Transportation, an agency of the State of South Carolina, and the Commission of the Department of Transportation, Robert W. Harrell, John N. Hardee, Eugene Stoddard, F. Hugh Atkins, B. Bayles Mack, L. Morgan Martin, and J. M. Truluck, in their capacities as Commissioners thereof, ... Respondents.

PETITIONER'S AMENDED BRIEF

James G. Carpenter, Esq.
S.C. Bar No. 1136

Jennifer J. Miller, Esq.
S.C. Bar. No. 13611

Attorneys for Petitioner
THE CARPENTER LAW FIRM, PC
819 East North St., Ste. 230
Greenville, South Carolina 29601
(864) 235-1269

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

Edward D. Sloan, Jr., ("Sloan") petitioned this Court for a reversal of Opinion No. 2003-UP-416 (S.C. Ct. Rec. filed June 19, 2003). The Court of Appeals ruled that Sloan lacked standing and addressed the merits of his claims only briefly.

Sloan is a citizen, resident, taxpayer, and registered elector of the State of South Carolina, and brought this action individually and on behalf of all others similarly situated. The South Carolina Department of Transportation ("SCDOT") is an agency of the State of South Carolina. Respondent South Carolina Commission of the Department of Transportation ("SCCDOT") is the governing body of SCDOT. The individual Respondents are Commissioners of the SCCDOT and were named in that capacity.

Sloan filed three actions against the SCDOT and SCCDOT ("Respondents") challenging the validity of 3 contracts procuring $800 million of procurements of construction. Sloan alleges that Respondents' use of Requests for Proposals ("RFPs") is not authorized by statute, and that Respondents violated statutory bonding requirements.[1] Therefore, each of these contracts is *ultra vires*. These actions seek declaratory and injunctive relief.

CAROLINA BAYS PARKWAY

The first action, filed May 24, 2000, challenged the validity of a contract executed March 1, 2000, by which Respondents selected the source of procurement of more than $225 million of construction for the Carolina Bays Parkway without bids (App. pp. 32, 304). Respondents did not publish an Invitation for Bids or receive bids. The contractor was not a bidder.

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[1] This court ruled September 22, 2004, that the bonding issue was not properly before it.

COOPER RIVER BRIDGE

The second action, filed July 18, 2000, challenged the validity of a contract by which Respondents procured the construction of the Cooper River Bridge in Charleston using a Request For Proposals ("RFP") dated July 14, 2000. (App. pp. 35, 393). Respondents represented to the Court that they would require a payment bond and a performance bond in the full amount of the contract contrary to provisions in the RFP that were contrary to law (App. p. 152).

S.C. HIGHWAY 170

The third action, filed October 12, 2000, challenged the validity of Respondents' contract executed September 28, 2000 procuring construction of Highway 170 for more than $80 million using an RFP (App. pp. 38, 352).

The Highway 170 case was filed in Richland County. The trial court transferred the Carolina Bays and Cooper River Bridge actions to Richland County September 15, 2000 (App. p. 3). The trial court consolidated the three matters for trial (App. p. 6). The parties filed cross motions for summary judgment and supporting memoranda (App. pp. 41, 57, 86, 116). The trial court heard argument on June 1, 2001. The parties represented to the Court that there were no genuine issues of material fact and that the case should be decided as a matter of law (App. p. 123).

In support of their motion, Respondents presented evidence related to sources of funding, special agreements with other government entities, and methods of source selection permitted by other jurisdictions (App. p. 86).

On May 24, 2001, Sloan filed a motion in limine to strike all those parts of the Respondent's motion, memorandum of law, and exhibits related to the financing of these

construction projects (other than those parts necessary to show that more than $1 million of taxpayer money was spent) (App. p. 113). Sloan also petitioned the trial court to strike all parts of Respondent's motion, memoranda and exhibits that discuss the merits of policy choices of allowing a guaranty rather than bonds, or of honoring bonds for which the SCDOT is not the obligee. *Id.* The trial court denied Sloan's motion (App. p. 123-124).

The trial court ruled that Sloan lacked standing as a citizen and taxpayer but nevertheless granted Sloan standing because of the public interest involved (App. p. 8). The trial court ruled against Sloan on the merits, finding that the collaborative funding of the SCDOT, State Infrastructure Bank, and federal government for the three projects justified the SCDOT's use of a method of source selection other than competitive sealed bidding, and that the RFP process complied with S.C. Code Ann. § 57-5-1620. *Id.* The trial court also ruled that the SCDOT's acceptance of the parent company guaranty in lieu of the bonds in the Carolina Bays case complied with S.C. Code Ann. § 57-5-1660. *Id.*

Sloan appealed, and the Court of Appeals affirmed without oral argument (App. p. 610). The court ruled that Sloan did not possess taxpayer standing. The court established new rules limiting taxpayer standing, which conflict with decisions of this Court. Furthermore, the Court of Appeals refused to grant public interest standing to Sloan.

Finally, the Court of Appeals failed to appreciate the fundamental differences between a Request for Proposals and an Invitation for Bids, but rather used the two terms interchangeably.

Sloan petitions this Court to reverse the decision by the Court of Appeals, and to reverse the trial court's decision granting summary judgment to the Respondents.

STATEMENT OF FACTS

SCDOT procured construction by publishing RFPs to select a source of procurement rather than by publishing Invitations for Bids for three projects: the Carolina Bays Parkway, the Cooper River Bridge, and Highway 170, (App. pp. 393, 406, 425). In none of the three procurements did Respondents publish an Invitation for Bids or receive bids.

In the Carolina Bays Parkway project, Respondents also accepted guaranties by the contractor's parent companies, failing to obtain the bonds required by law from a third party surety (App. p. 198).

On the Cooper River Bridge project, page 4 of the RFP requires only that the amount of the bonds be equal to the "construction cost" rather than to the "contract amount" (App. p. 393). Respondents later corrected this illegality. After the hearing, Respondents procured construction of the Cooper River Bridge effective July 2, 2001 for $531 million.

ARGUMENT

S.C. Code Ann. § 57-5-1620, with at least seventy years of history in South Carolina, requires that Respondents' award of construction contracts for $10,000 or more shall be made to "the lowest qualified bidder," whose "bid" meets SCDOT requirements. *Id.*

Long after the enactment of that statute, South Carolina adopted the Consolidated Procurement Code, which allows a variety of methods of selection of source (under differing and limited circumstances), including competitive sealed bids and competitive sealed proposals. The Consolidated Code specifically exempts SCDOT from its application for procurement of construction of bridges and roads. S.C. Code Ann. § 11-35-710(1).

S.C. Code Ann. § 57-5-1660 requires SCDOT to obtain both a performance and indemnity bond on every public highway construction contract exceeding $10,000 in the full amount of the contract and a payment bond in at least half the amount of the contract. *Id.*

I. THE COURT OF APPEALS ERRED IN RULING THAT SLOAN DID NOT POSSESS STANDING.

A. The Trial Court Properly Ruled that Sloan Possessed Public Interest Standing.

The trial court properly ruled that Sloan possessed standing under *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). This Court held that when government commits an *ultra vires* act, the public importance of the issue supports granting standing to the plaintiff so that the issue may be decided for future guidance.

> In this case, Doctors have specifically alleged that the County committed an *ultra vires* act by exceeding its statutory authority to issue the hospital bonds. . . . Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring

> that their county acts within the legal parameters established by the legislature for funding hospital development. Thus, by virtue of the immense public interest at stake here, Doctors have standing to bring the present action, and any further determination of imminent prejudice is unnecessary.

Id. at 333 S.C. 519, 511 S.E.2d 69, 75-76 (1999).

Most recently, this Court ruled in *Sloan v. Sanford*, "Citizens must be afforded access to the judicial process to address alleged injuries." 357 S.C. 431, 593 S.E.2d 470 (citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)). Petitioner submits that the expenditure of more than $800 million of taxpayer funds by Respondents in construction is at least as important as the proper funding for a hospital for MUSC.

Similarly in *Evins v. Richland County Historic Preservation District*, this Court found public interest standing was appropriately granted to the plaintiff. *Id.* at 341 S.C. 15, 532 S.E.2d 876 (2000). This Court held:

> Appellants attempt to distinguish *Baird* by arguing that its holding applies only to ultra vires acts and then only to those of immense public importance. We disagree. While in *Baird* there was an allegation of an ultra vires act, clearly in several cases, we have held a citizen has standing when ultra vires acts were not alleged. *Berry v. Zahler,* 220 S.C. 86, 66 S.E.2d 459 (1951) (holding that questions of public interest originally encompassed in an action should be decided for future guidance); *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E.2d 88 (1947) (same). In any event, we hold the actions of RCHPC were ultra vires as discussed above. Thus, the trial court correctly held Evins has standing.

Id. at 341 S.C. 15, 21, 532 S.E.2d 876, 879. The trial court properly relied on the foregoing decisions from this Court and granted Sloan public interest standing.

B. The Court of Appeals Erred in Ruling that Sloan Did Not Possess Public Interest Standing.

The Court of Appeals admitted that the case at bar is one of public importance but ruled that Sloan does not possess standing under *Baird,* because in *Baird* "there were additional factors that would confer standing," that this case lacks. (App. p. 610). Sloan

contends that this holding misreads *Baird*. In *Baird* and *Evins*, this Court ruled that standing had been granted because of the public importance of the issues and for future guidance. *Id.* at 333 S.C. 519, 511 S.E.2d 69, 75-76 (1999); 341 S.C. 15, 532 S.E.2d 876 (2000).

Respondents admit spending $800 million to fund this construction (App. p. 532). They argue about the source of funds and how much of the $800 million came from general South Carolina tax revenues rather than federal funds, gasoline taxes, or user fees, but they do not dispute the total expenditure. *Id.* Respondents argue that the expenditure of $800 million through proposals when the statute requires that it be spent through "bids" is not an issue of public importance. Despite their contention, this staggering amount of money, spent improperly, is an issue of substantial public importance.

Just as this Court granted standing to the plaintiffs in *Baird* and *Evins*, this Court should also grant Sloan standing because of the public importance of Respondents' expenditure of more than $800 million of public funds in a manner not authorized by law.

C. The Court of Appeals Erred in Ruling that Lack of Action by a Disappointed Proposer Barred Sloan's Standing.

The Court of Appeals acknowledged, "the issue in this case is unquestionably important to the public" (App. p. 616). Nevertheless, the Court held that disappointed "firms whose bids [sic] were rejected would have a greater interest in Respondent's procurement procedures than did Sloan" (App. pp. 616-617). Sloan respectfully suggests that the Court of Appeals assumed (in error) that such a disappointed or aggrieved proposer would possess standing to bring an action to address illegalities in the procurements at bar. However, no procedure allows a disappointed proposer to sue SCDOT over its

failure to comply with the law on the basis on which Sloan challenges Respondents. South Carolina law grants a disappointed proposer no special standing, only standing as a taxpayer. Accordingly, a disappointed proposer, if a South Carolinian or a State taxpayer, would therefore possess only the same right to bring an action as Sloan.

If the procurements at bar had been subject to the S.C. Consolidated Procurement Code, an aggrieved proposer would possess the right to protest, and the decision on that protest could be reviewed by the Procurement Review Panel. After review, he could obtain limited judicial review of the decision under the Administrative Procedures Act. S.C. Code Ann. § 1-23-380. Under the Consolidated Procurement Code, an aggrieved bidder or proposer could utilize the Procurement Review Panel and the Administrative Procedures Act, even if he were neither a taxpayer nor citizen of South Carolina.

However S.C. Code Ann. § 11-35-710(1) exempts SCDOT procurements from application of the S.C. Consolidated Procurement Code, including its remedies for disappointed bidders and proposers. No statute provides any administrative protest process to aggrieved bidders or proposers to the SCDOT. S.C. Code Ann. § 57-5-1670 provides a contractor, not a proposer, a right to sue Respondent, in circumstances not applicable here, but provides the contractor no other right. Therefore, Sloan respectfully submits that an aggrieved proposer to SCDOT would not possess the standing provided by S.C. Code Ann. § 1-23-380, or any other statute.

Even assuming *arguendo*, as the Court of Appeals suggests, that "any of the firms whose bids [sic] were rejected would have a greater interest in DOT's procurement procedures than did Sloan," and "None of these firms, however, brought suit alleging the procedures were improper," nothing in South Carolina law gives a proposer a right to

bring such an action. Thus, under the Court of Appeals' ruling, no standing is available to anyone, and Chief Justice Toal's warning is realized: "there [is] no opportunity to remedy governmental abuse." *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72, 75 (1997).

Furthermore, the Court of Appeals had previously explained at some length that the interest of a taxpayer is fundamentally different from the interest of a disappointed proposer. *Sloan v. The School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

> Although South Carolina has allowed taxpayer standing in other contexts, we have not been confronted with a case wherein a taxpayer challenges a violation of a statute requiring competitive bidding in the award of governmental contracts. However, other states have addressed this issue and held taxpayers have standing because **competitive bidding laws are for the benefit of taxpayers.**

342 S.C. at 521, 537 S.E.2d at 302 (emphasis added) (lengthy internal citations omitted).

In the case at bar, the Court of Appeals blurred the interest of a disappointed proposer with the interest of a taxpayer so that the lack of action by disappointed proposers, who possessed no right to bring an action, operated to bar an action by a taxpayer. This holding is fundamentally contrary to the sound legal analysis of *Sloan v. School District of Greenville County*, and *Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (Ct. App 2003). It is also contrary to the reasoning of *Baird*, 333 S.C. 519, 511 S.E.2d 69, 75-76 (1999) and *Evins*, 341 S.C. 15, 532 S.E.2d 876 (2000).

D. The Court of Appeals Erred in Refusing to Grant Sloan Taxpayer Standing.

Sloan pursues these actions as a taxpayer, not as a member of the general public. Respondent admits that State taxpayer funds were contributed to and spent from the State Infrastructure Bank in "an amount equal to a one-cent gas tax on an annual basis from

SCDOT" and that "[a]dditionally, an appropriation of $65,503,706 was made by the General Assembly" (App. p. 532). Furthermore, the SCDOT admits and the trial court found "that all three of the challenged projects are or will be financed by the SIB" and that "[t]he SIB was able to contribute $86.5 million [on Highway 170]" (App. p. 22, 546)). Therefore, it is clear that many taxpayer funds were used. Sloan respectfully submits that the Court of Appeals erred in ruling that he does not possess taxpayer standing.

1. Sloan, A Taxpayer, Possesses An Interest in Seeing that Public Officials Disburse Public Funds Lawfully.

"A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." *Sloan v. School Dist. of Greenville Cty.*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (citing *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885 (1902)). Sloan challenges the illegal governmental acts of Respondents in violating procurement statutes when procuring construction of three immense projects costing the State hundreds of millions of dollars. "Taxpayers 'have an interest in seeing that city officials disburse funds in a lawful manner." *Id.* (citing *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301). Accordingly, Petitioner also possesses standing to see that State agencies procure in a lawful manner.

2. Sloan, A Taxpayer, Possesses an Interest that is Distinct from State Citizens as a Whole.

The Court of Appeals' acknowledged authority holding that county taxpayers are a distinct subset of county residents (App. p. 610). Sloan respectfully suggests that State taxpayers are likewise a distinct subset of State citizens. In *Myers v. Patterson*, 350 S.C. 248, 433 S.E.2d 841 (1993), State taxpayers sued the State Treasurer, Commissioners and Executive Director of the South Carolina Highways and Public Transportation Commis-

sion. This Court acknowledged that a plaintiff ordinarily must allege damage to himself different from that sustained by the public generally, but also noted the exception to the rule: an unlawful diversion of public funds.

> In such cases, **a taxpayer** who may be compelled to pay the assessment, or **who has contributed to the sum jeopardized**, is considered to have sufficient interest to enjoin the illegal act. [*Shillito v. City of Spartanburg,* 214 S.C. 11, 22, 51 S.E.2d 95, 97 (1948)]. *See also Kirk v. Clark,* 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that **a taxpayer may maintain an action in equity**, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law).

350 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added). Thus, this Court explicitly recognized that a State taxpayer suing the State possesses standing if he has contributed to the sum at issue. In the cases at bar, the jeopardized sum exceeds $1.3 million of direct State tax funds and more than $800 million in total public funds. In *Myers v. Patterson*, the sum at issue totaled $25 million.

Accordingly, Sloan, a State taxpayer, possesses standing to contest illegal expenditures of State tax funds, just as a local taxpayer possesses standing to contest an illegal expenditure of local tax funds.

3. The Court of Appeals Erred in Requiring a Constitutional Challenge For Taxpayer Standing.

The Court of Appeals ruled that taxpayer standing is used only to redress constitutional violations and not mere violations of statutory law, and that without a constitutional challenge, Sloan did not possess standing. In support of the ruling of the Court of Appeals, Respondents argue that *Myers v. Patterson* requires State taxpayers to challenge the constitutionality of an action or statute to possess standing. *Id.* at 315 S.C. 248, 433 S.E.2d 841 (1993). This argument misreads *Myers*. *Id.* Neither *Myers* nor any

other South Carolina authority supports this ruling, but rather it is novel and unprecedented.

In support of the Court of Appeals' ruling, Respondents assert that if the SCDOT merely violates a statute, its conduct should be beyond review; whereas if it violates the Constitution, this Court may review the violation. They offer no legal opinion, analytical basis for articulating this distinction, or public policy justification for Respondents' alleged right to violate its governing statutes without restraint or consequence.

The Court of Appeals reads *Shillito v. Spartanburg* to require that a plaintiff assert a constitutional violation to possess standing. *Id.* at 214 S.C. 11, 51 S.E.2d 95 (1948). However, like *Myers, Shillito's* ruling is, "An apparent exception to this rule exists when the act sought to be enjoined is an unlawful diversion of public funds." *Id.* at 99. This Court then ruled that if standing should be granted to enjoin these **unlawful diversions of public funds**, a citizen should **also** be granted standing "to contest the **expenditure of public funds under an alleged unconstitutional statute**." *Id.* (emphasis added). At no point in the opinion does this Court rule that order to be granted standing, a State taxpayer must challenge the expenditure on a constitutional basis or possess an interest separate from contributing taxes to the fund from which an unlawful diversion was made. Accordingly, this novel holding substantially and artificially limits taxpayer standing and should be reversed.

Myers v. Patterson granted State taxpayer standing to a plaintiff challenging SCDOT expenditures, as in the case at bar. *Id.* at 315 S.C. 248, 433 S.E.2d 841. The Court of Appeals distinguished *Myers* by limiting the ruling to a constitutional challenge. However, this Court in *Myers* does not make this distinction. Instead, this Court distin-

guished a State taxpayer with standing from one without standing by whether the taxpayer had "contributed to a sum jeopardized." *Id.* This Court mentioned "the expenditure of public funds under an alleged unconstitutional statute" as only one type of "unlawful diversion of public funds" which creates "an exception to the rule" that generally requires plaintiffs "to allege and prove damage to themselves different in character from that sustained by the public generally." *Id.*

Thus, no South Carolina precedent supports the Court of Appeals' decision that Sloan lacks State taxpayer standing because he did not challenge the constitutionality of the SCDOT's procurement statutes. Furthermore, the Court of Appeals' decision creating a new exception to taxpayer standing contravenes precedent from this Court.

4. The Court of Appeals Erred in Creating a *De Minimis* Exception.

Respondent admits that $0.01 for every gallon of gas sold in South Carolina since 1997 has been funneled from SCDOT tax receipts to the SIB (App. p. 532). Nevertheless, the Court of Appeals ruled that Sloan does not possess State taxpayer standing because only his gasoline taxes and $0.35 of his general taxes ("a '*de minimis*' amount") were contributed to the funds used (App. p. 615). Respondents argued that "at least concerning a challenge on a State level, a taxpayer must have more than a *de minimis* interest in order to have standing" (App. p. 544). The Court of Appeals cites *Crews v. Beattie* for this proposition. *Id.* at 197 S.C. 32, 14 S.E.2d 351 (1941). However, the *Crews* opinion never mentions a *de minimis* rule addressing the amount of state taxpayer funds involved. Furthermore, in *Crews*, no State taxpayer funds were involved.

> In the instant case, petitioner has no special or peculiar interest to protect. The funds in question **never accrued from taxation**, but from the operation of an

> electric system by a public corporation created for the sole purpose stated in Section 5 of the Act of 1935 above set out.

Id.

Neither a "*de minimis* rule" nor a distinction between the level of standing required for State and local taxpayers exists anywhere in South Carolina case law. This Court has ruled that a taxpayer possessed standing to challenge an illegal expenditure even though his taxes contributed only $6.28 to the illegal fund. *Shillito v. Spartanburg,* 214 S.C. 11, 51 S.E.2d 95, 99 (1948). Other cases in a long line of opinions addressing this issue have never applied a *de minimis* rule to taxpayer standing. *Mauldin v. City Council,* 33 S.C. 1, 11 S.E. 434 (1890); *Sligh v. Bowers* supra; *Kirk v. Clark,* 191 S.C. 205, 4 S.E.2d 13 (1939); *Brown v. Wingard,* supra; *Sloan v. School Dist. of Greenville Cty.*, supra. In *Brown v. Wingard,* although the amount of taxpayer funds was probably even smaller than that contributed to the funds in the cases at bar, this Court held that taxpayers "have an interest in seeing that city officials disburse funds in a lawful manner." *Sloan,* supra, quoting *Brown,* supra. Likewise, Sloan and the other State taxpayers possess an interest in seeing that Respondent spends tax funds lawfully.

Furthermore, this rule is contrary to the majority of jurisdictions that have considered this issue.

> [I]f a plaintiff is a taxpayer the amount of the damage is immaterial. The money interest of the complaining party, if there is any, is sufficient, although infinitesimal.

18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.13 *Citizens' and Taxpayers' Suits* (3d ed. 1993) (citing *Brockman v. City of Creston,* 79 Iowa 587, 44 N.W. 822 (1890) (A court cannot deny a taxpayer relief because his interest as a taxpayer is inconsiderable.); *Chippewa Bridge Co. v. City of Durand,* 122 Wis. 85, 106 Am.St.Rep.

931, 99 N.W. 603 (1904) ("A court will not stop to inquire respecting plaintiff's standing further than to determine whether he is a taxpayer ... even if personal loss to him would be infinitesimal."); *Suarez v. Police Jury of Parish of St. Bernard,* 203 La. 680, 14 So.2d 601 (1943) ("The fact that the taxpayer's interest might be small and not susceptible of accurate determination is not sufficient to deprive him of the right."); *Aichele v. Borough of Oaklyn,* 1 N.J.Super 621, 64 A.2d 924 (1948) ("[T]he standing of one otherwise qualified to question the resolution is not to be determined by the mere matter of dollars and cents involved."); *Saenz v. Lackey,* 533 S.W.2d 237, 522 S.W.2d 237 (1975) ("[W]hen a taxpayer brings an action to restrain the illegal expenditure by the commissioners' court of tax money he sues for himself, and that his interest in the subject matter is sufficient to support the action."). See also *Reynolds v. Wade,* 249 F.2d 73, 17 Alaska 401, 9th Cir. (Alaska), Oct. 31, 1957; *S.D. Realty Co. v. Sewarage Commission of City of Milwaulkee,* 15 Wis.2d. 15, 112 N.W. 2d 177, Wis., Nov. 28, 1961; *Woodard v. Reilly,* 244 La. 337, 152 So. 2d 41, La., Apr. 08, 1963; *Thompson v. Kenosha County,* 64 Wis. 2d 673, 221 N.W. 2d 845, Wis., Oct. 01, 1974; *City of Appleton v. Town of Menohsa,* 142 Wis. 2d 870, 419 N.W. 2d 249, Wis., Feb. 19, 1988; *Hart v. Ament,* 176 Wis. 2d 694, 500 N.W. 2d 312, Wis. June 08, 1993. This Court should reverse the Court of Appeals to correct the incorrect reading of the precedents and reverse the adoption of a *de minimis* exception to taxpayer standing.

The *de minimis* test, logically applied, will effectively end taxpayer actions, which this Court has consistently recognized. As a practical matter, in every taxpayer action the individual taxpayer, by definition, will possess only a minute personal financial interest in the portion of the illegal expenditure by any public body. Accordingly, the Court of Ap-

peals' new rule that a *de minimis* interest in any expenditure disqualifies a taxpayer from bringing a taxpayer action will eliminate all taxpayer actions except those brought by the absolute wealthiest of our citizens. If not corrected, this rule, taken to its logical conclusion, may end taxpayer standing in South Carolina.

Chief Justice Toal warned of such a result in her dissent in *Newman v. Richland County Historic Preservation* Commission: "If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse." *Id. at* 325 S.C. 79, 480 S.E.2d 72, 75 (1997).

The South Carolina Courts have consistently granted taxpayers standing to contest illegal government expenditures. *Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299 303-304 (Ct. App. 2000); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939); *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993). The Court of Appeals erred in adopting a *de minimis* test despite this precedent.

II. RESPONDENTS VIOLATED S.C. CODE ANN. § 57-5-1620 BY PROCURING FROM OTHER THAN THE "LOWEST QUALIFIED BIDDER."

S.C. Code Ann. § 57-5-1620 requires that Respondents award construction contracts through "bids."

> [A]wards by the department [of transportation] of construction contracts for ten thousand dollars and more . . . shall be made in each case to the **lowest qualified bidder** whose **bid** shall have been formally submitted in accordance with the requirements of the department.

Id. (emphasis added). This issue turns on the definitions of "bidder" and "bid" and "proposer" and "proposal." The definitions in the Consolidated Code and Sloan's expert witness, the former State Engineer, establish that a "proposal" is fundamentally different from a "bid" (App. pp. 460-464, 589-590).

Furthermore, the Court of Appeals recently established the differences between competitive sealed bidding using an Invitation for Bids, and competitive sealed proposals using Requests for Proposals in *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003).

> [T]he "competitive sealed bidding" method . . . of source selection proceeds in multiple stages. The County must first hire an architect or other design professional to prepare the initial plans and specifications for the new construction project. After the County has approved these initial plans, the design professional will typically draft a detailed set of construction drawings and specifications that will become part of a "bid package." The County will then use the bid package to publicly solicit bids from contractors to perform the work. The lowest responsible, responsive bidder is awarded the project.
>
> Under the Code, the County must use the competitive sealed bidding method to procure construction services over $15,000 unless one of several specific exceptions applies. *See* G.C.C. § § 7-212--7-242.5. One of these exceptions--the focal point of this case--is known as the "design-build" procurement method. [FN1] *See* § 7-242.5.
>
> > FN1. Professionals in the field of public procurement variously refer to this method of source selection as "design-build," "competitive sealed proposal," or "request for proposal." Though these terms are generally in-

> terchangeable, for ease of reference, we will refer exclusively to "design-build" when discussing this alternative to traditional competitive sealed bidding procurement.
>
> The design-build method differs from traditional competitive sealed bidding in two important ways. First, under the design-build method, the County enters into a single contract for design and construction of the project. This arrangement condenses the two-step process of competitive sealed bidding in which the County procures design services and then contracts separately for the actual construction. Design-build's single source procurement also enables design and construction to proceed concurrently, thereby shortening project duration. Once a design "footprint" for a structure has been prepared, a contractor may begin work such as grading and excavating a site, while a designer continues to design the structure.
>
> Second, the design-build method allows comparative subjective evaluations to be made when determining acceptable proposals for negotiation and award of the contract. Price need not be the sole or primary criterion for evaluating competing proposals--it may be only one of several factors considered. The County may select the design-build team based on other factors such as experience, project team members, and expertise.
>
> It is design-build's lack of objective, bright-line criteria that raises concerns about its use. Critics espouse that design-build vests too much discretion with the governing body regarding when and to whom public contracts are awarded. Because price is not a controlling factor in design- build source selection, the public entity may not always receive the lowest, most competitive price possible. *See e.g., Sloan v. Sch. Dist. of Greenville County,* 342 S.C. 515, 521, 537 S.E.2d 299, 302 (Ct.App.2000) (opining that "[t]his court has long maintained that '[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price'"). Without proper guidelines and oversight, design- build may foster the impression that the government is somehow less accountable for its decisions as to how it spends taxpayer money.

Id. at 356 S.C. 531, 540-542, 590 S.E.2d 338, 343, 344.

Selecting the source of procurement by proposals limits the number of potential vendors. In the case at bar, a construction company, fully qualified to build roads and bridges but lacking design capacity or ability would be unable to propose. Limiting the number of potential vendors drives up the price that the public will pay for the construction, thus harming the taxpayer. Furthermore, it is possible for a proposer to propose the

design desired by the contracting party, but another proposer to offer a lower price for construction. When these two functions must come from the same vendor, the taxpayers are likely to pay more for the construction.

In the case at bar, the Court of Appeals repeatedly used the terms "bid" and "proposal" interchangeably throughout its Statement of Facts. *Id.* at 356 S.C. 531, 540-541, 590 S.E.2d 338, 343-344 (S.C. App., 2003). Petitioner respectfully suggests that the Court of Appeals' interchangeable use of the two terms reflects the Court of Appeals' failure to recognize **the fundamental premise** of Petitioner's claim: a bid differs statutorily from a proposal.

S.C. Code Ann. § 57-5-1620 supports the public policy of the State for competitive bidding. The Court of Appeals held that "competitive bidding laws are for the benefit of taxpayers." *Sloan v. Greenville County School Dist.*, 342 S.C. 515, 537 S.E. 2d 299 (Ct. App. 2000). The Court of Appeals also noted:

> [T]he General Assembly's intent is relevant when examining the public policy of competitive sealed bidding in the award of public contracts. The General Assembly stated its intent as follows: "Section 2. It is the intent of the General Assembly to ensure that the heads of state agencies, departments, and institutions are held accountable for the effective and efficient use of the public resources entrusted to them annually in the appropriation process. Act No. 178, 1993 S.C. Acts 1367.

Id. at. 302-303. The Court of Appeals also held:

> Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to maintain the public's trust and confidence in governmental management of public funds. The integrity of the competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed ... without showing that the municipality suffered any alleged injury."

Id. at 303-304, quoting 18 Eugene McQuillin, *The Law of Municipal Corporations*§ 52.6 (3d ed. 1993) and citing Sandra M. Stevenson, *Antieau on Local Government Law* § 73.04 (2d ed. 1999). The Court of Appeals quoted with approval similar holdings from other jurisdictions. *Lawrence Brunoli, Inc. v. Town of Branford*, 247 Conn. 407, 722 A.2d 271, 274 (1999) "This court has long maintained that '[m]unicipal **competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption** in the award of contracts, . . . and to benefit the taxpayers, not the bidders; they should be construed to accomplish these purposes fairly and reasonably with sole reference to the public interest.'") (quoting *John J. Brennan Constr. Corp. v. City of Shelton*, 187 Conn. 695, 448, A.2d 180, 184 (1982); . . . *Eastern Missouri Laborers District Council v. St. Louis County*, 781 S.W. 2d 43, 46 (Mo. 1989) "The primary basis for taxpayer suits arises from the need to ensure that governmental officials conform to the law. It rests upon the indispensable need to **keep public corporations, their officers, agents and servants strictly within the limits of their obligations** and faithful to the service of the citizens and taxpayers." (citation omitted). *Sloan*, 537 S.E.2d 299, 302 (emphasis added). The governing SCDOT statute conforms to this State public policy, as expressed in South Carolina statutory and common law.

A. S.C. Code Ann. § 57-5-1620 Requires Procurement by Bidding.

The trial court ruled that a "proposer" in the competitive sealed process is the same as a "bidder" in the competitive sealed bidding process (App. pp. 25-26). This ruling was an error of law.

1. A "Proposer" Is Not a "Bidder, and a "Proposal" Is Not a "Bid."

The trial court interpreted § 57-5-1620 to allow Respondents to procure from a proposer. In other words, the trial court attempted to change the wording of the statute by judicial fiat: when the statute says "bidder" who submits a "bid," the trial court reads it "proposer" who submits a "proposal." This reading is contrary to sound rules of statutory construction.

S.C. Ann. § 11-35-310 distinguishes the terms "Invitation for Bids" from "Request for Proposals."

> (20) "Invitation for Bids" means a written or published solicitation issued by an authorized procurement officer for bids to contract for the procurement or disposal of stated supplies, services or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.
>
> * * *
>
> (28) "Request for Proposals (RFP)" means a written or published solicitation issued by an authorized procurement officer for proposals to provide supplies or services, which ordinarily result in the award of the contract to the responsible bidder making the proposal determined to be most advantageous to the State. The award of the contract must be made on the basis of evaluation factors which must be stated in the RFP.

Id.

Article V, Source Selection and Contract Formation also distinguishes the terms "Invitation for bids" from "Request for proposals."

> (3) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids in accordance with the procedures set forth in Section 11-35-1520.
>
> (5) "Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

S.C. Code Ann. § 11-35-1410. Furthermore, the competitive sealed bidding process is set out in S.C. Code Ann. § 11-35-1520, and the competitive sealed proposal process is set out in § 11-35-1530. Thus, the terms are distinct and not interchangeable.

Marion Dorsey, former South Carolina State Engineer, submitted an affidavit explaining the difference between a "bidder" and a "proposer" (App. p. 68). "A 'bidder' is a person or entity that submits a bid in response to an invitation for bids or an advertisement for bids." *Id.* "A bidder makes an irrevocable offer, subject to acceptance for an established time." *Id.* "Ordinarily, public owners evaluate a bid exclusively with objective criteria, including whether the bid is responsive to the invitation for bids (whether it meets the technical requirements set forth in the invitation for bids)." *Id.* "After a determination of responsiveness, ordinarily, price is the **only** consideration in selecting the successful bidder to be the source of procurement." *Id.*

"In contrast, a proposer responds to a request for proposals by making a proposal." *Id.* "A proposal may be viewed as an invitation to negotiate." *Id.* "A proposal is evaluated on subjective criteria, in addition to whether it is responsive to the request for proposals." *Id.* "Often price is not an evaluation criterion in using a request for proposals to select the successful proposer to be the source of procurement." *Id.*

Thus, the South Carolina Code and the former South Carolina State Engineer both distinguish a bidder from a proposer and an Invitation for Bids from a Request for Proposals. As noted above, in a recent case the Court of Appeals also recognized this difference. *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003).

2. Proper Statutory Construction Distinguishes the Terms.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, **it is not the court's place to change the meaning of a clear and unambiguous statute.** *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the **court has no right to impose another meaning.** *Id.* at 233, 509 S.E.2d at 262 (*citing Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the **text of a statute is considered the best evidence of the legislative intent or will.** Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (emphasis added).

This Court amplified this rule in *Paschal v. State Election Commission*, 317 S.C. 434, 454 S.E.2d 890 (1995).

> If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994). Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993) (emphasis supplied). This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993).
>
> *Id.* at 317 S.C. 434, 436-37, 454 S.E.2d 890, 892 (1995).

Respondents contend that a bidder closely resembles a proposer, and that by procuring from the proposer, they comply with the statute. The definitions demonstrate that the two terms are not synonymous. Furthermore, "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' states that 'to express or include one thing **implies the exclusion of another, or of the alternative.**' Black's Law Dictionary 602 (7th ed. 1999)." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578,

582 (2000) (emphasis added). Accordingly, in the case at bar, S.C. Code Ann. § 57-5-1620's **inclusion** of the terms "bidder" and "bid" implies the **exclusion** of "proposer" and "proposal."

This Court in *Hodges* further explained,

> If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. *Abell v. Bell,* 229 S.C. 1, 91 S.E.2d 548 (1956). When the language of a statute is clear and explicit, **a court cannot rewrite the statute and inject matters into it which are not in the legislature's language**, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning. *Timmons v. South Carolina Tricentennial Comm'n,* 254 S.C. 378, 175 S.E.2d 805 (1970).

Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (emphasis added).

In enacting S.C. Code Ann. § 57-5-1620 to require that the contract be awarded to the "lowest qualified bidder," the General Assembly decreed that subjective criteria were not to be used, but rather that price was to be the **only** factor in evaluating responsive bids from qualified bidders, therefore eliminating any implication that proposals could be considered. In contrast, Respondents considered more than cost in reviewing responses to the RFPs and selecting its source of procurement (App. pp. 71, 185, 301-302). The Respondents possess no statutory authority to procure construction from other than the "lowest qualified bidder."

The clear intent of S.C. Code Ann. § 57-5-1620 was to prohibit the Respondents from awarding such contracts using any subjective criteria. This statute is to be given its plain meaning. Thus, the Court of Appeals erred in failing to rule that the procurement of construction using Requests for Proposals violated S.C. Code Ann. § 57-5-1620.

B. S.C. Code Ann. § 57-5-1620 Should Be Applied Broadly to the Cases at Bar.

S.C. Code Ann. § 57-5-1620 is a remedial statute and should be construed broadly to achieve its purpose. Op. Atty. Gen., Op. No. **-* (Jan. 8, 1999) p. 2, 1999 WL 92410 (S.C.A.G.) (interpreting § 57-3-210).

> This Office has frequently commented upon the nature of the Consolidated Procurement Code as a statute which is **remedial** in purpose and thus requiring a **broad and expansive construction.** In Op. Atty. Gen., Op. No. 84-8 (Jan. 24, 1984), for example, we expressed this opinion as follows: "[t]he Consolidated Procurement Code is set forth in § 11-35-10 et seq. The legislative purposes and objectives of the Code, which requires competitive bidding, are expressed in § 11-35-20. Among these are the consolidation and clarification of procurement law in the State; the promotion of increased public confidence in the procedures followed in public procurement; the insuring of fair and equitable treatment of all persons who deal with the State's procurement system; the provision of maximum purchasing power of State expenditures; the encouragement of broad-based competition for public procurement; and the insuring of a procurement system of quality and integrity. In construing the applicability of statutes **full effect must be given the legislative purpose.** *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E. 2d 424 (1980). The above legislative purposes are in complete accord with the objectives of bidding requirements and public procurement codes, generally. Bidding requirements in public procurement are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of ... [government] contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with **sole reference to public interest**. *Yohe v. City of Lower Burrell*, 418 Pa. 23, 208 A.2d 847, 850 (1965), quoting 10 McQuillin, Municipal Corporations, § 29.29. **There is indeed a strong public policy which favors competitive bidding.** See *Terminal Const. Co. v. Atlantic City Sewerage Auth.*, 67 N.J. 403, 341 A.2d 327 (1975). **Accordingly, procurement statutes such as South Carolina's Consolidated Procurement Code are frequently held to be remedial in nature and are construed broadly to achieve their purpose.** In discussing a competitive bidding statute, one court has held that the courts will not, by strict construction, narrow the scope of a statute and limit its application, in cases where such construction is against the legislative policy. *Reiter v. Chapman*, (Wash.), 31 P.2d 1005, 1007 (1934).

Id. at 2.

C. The Enabling Legislation for the State Infrastructure Bank Did Not Repeal § 57-5-1620 by Implication.

The trial court ruled that the statutory system that created the State Infrastructure Bank ("SIB") repealed S.C. Code Ann. § 57-5-1620 by implication. Repeal of a statute by implication is disfavored in the law.

> The law does not favor the implied repeal of a statute. *Butler v. Unisun Ins.*, 323 S.C. 402, 475 S.E.2d 758 (1996). Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Id.* "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." *Justice v. Pantry,* 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct.App.1998) (quoting *State v. Hood,* 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)).

Hodges v. Rainey, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000).

The South Carolina Court of Appeals explained that for one statute to repeal another by implication, the two statutes must relate to the same subject matter, cover the same situations, and be plainly irreconcilable.

> Repeal by implication is disfavored and is found only when two statutes are **incapable of reconcilement**. *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 475 S.E.2d 758 (1996). "[T]he repugnancy must not only be **plain**, but the provisions of the two statutes must be **incapable** of any reasonable reconcilement; **for if they can be construed so that both can stand, the [c]ourt will so construe them**." *City of Rock Hill v. South Carolina Dept. of Health & Envtl. Control,* 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). "[T]o effect an implied repeal of one statute by another, they must both relate to the same subject, and cover the same situations, since one statute is not repugnant to another unless there is such relation." *McCollum v. Snipes, et al.*, 213 S.C. 254, 268, 49 S.E.2d 12, 17-18 (1948).

Justice v. Pantry, 330 S.C. 37, 43, 496 S.E.2d 871, 874 (1998) (emphasis added).

In the case at bar, the statute requiring the Respondents to procure through bids can be harmonized with the statutes that established the SIB. The trial court erred in ruling that SIB funding methods superceded § 57-5-1620. The trial court failed to distin-

guish the SIB funding methods from the procurement methods required in S.C. Code Ann. § 57-5-1620. The Respondents were required to follow § 57-5-1620, issue an Invitation for Bids, and select the lowest bidder, regardless of the funding source.

In *Justice*, the Court of Appeals addressed a similar circumstance.

> **Since repeal by implication is disfavored and these two statutes "harmonize," we would not be "justified in deciding that the last repealed the first."** *Hood,* 181 S.C. at 491, 188 S.E. at 136; *Butler, supra.* . . . [W]e cannot now effect through judicial means what is solely within the authority of the legislature. *Adkins v. Comcar Indus., Inc.,* 316 S.C. 149, 151-52, 447 S.E.2d 228, 230 (Ct.App.1994) (An appellate court "has no legislative powers. Our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature while the responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts." (citation omitted)), *aff'd,* 323 S.C. 409, 475 S.E.2d 762 (1996).

Id. at 330 S.C. 37, 44, 496 S.E.2d 871, 875 (1998) (emphasis added).

This Court explicitly validated the Court of Appeals' analysis.

> Repeal by implication is disfavored and is found only when two statutes are incapable of reconcilement. *Butler v. Unisun Ins.Co.,* 323 S.C. 402, 475 S.E.2d 758 (1996). The Court of Appeals addressed this question at length in *Justice v. Pantry* and concluded that section 32-1-20 was not impliedly repealed by enactment of the VGMA because the statutes are not repugnant to each other and are not incapable of a reasonable reconcilement. 330 S.C. 37, 496 S.E.2d 871 (Ct.App.1998). We agree, the VGMA did not impliedly repeal the gaming statutes. *Justice v. Pantry, supra.*

Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 95-96, 508 S.E.2d 848, 851 (1998).

In the case at bar, the later statutes establishing the SIB did not repeal S.C. Code Ann. § 57-5-1620. Indeed, the SIB statutes do not mention or address procurement. S.C. Code Ann. § 57-5-1620 continues to govern SCDOT procurement of road and bridge construction.

D. When Respondents Violate the Procurement Laws, the Contracts Are *Ultra Vires* and Void.

Respondents procured in violation of statutory procedures. Thus, the contract is void, and Respondents should be prohibited from honoring the contract. *Pennell & Harley v. Hearon*, 169 S.C. 16, 168 S.E. 188 (1933). In *Pennell & Harley*, the State Highway Department (Respondents' predecessor) procured coarse aggregate for paving without using the advertisement and bid process then required by statute. The Special Referee found that the Department had not followed the statutory procedures for such a procurement.

> Although the purchase of the required aggregate involved an expenditure in excess of $40,000, the department, **without publishing any public advertisement for bids**, entered into a certain contract, bearing the date April 8th, with the respondent quarry company to furnish such aggregate.

168 S.E. at 189 (emphasis added). At the conclusion of his report, the Special Referee ruled:

> So far as the department is concerned, the contract [to procure the coarse aggregate] is **unquestionably void**, because it is admittedly in violation of [the competitive bidding statute]. The statute is . . . mandatory. . . . Unless this statute is **strictly complied with**, any contract with the highway department is **"void."**

168 S.E. at 191 (citations omitted) (emphasis added). The Supreme Court ruled that the referee's report "is adopted as the opinion of this court, and is affirmed in all respects."

The Court of Appeals in *Sloan v. School District of Greenville County* ruled,

> Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to **maintain the public's trust and confidence in governmental management of public funds**. The integrity of the competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, **a waste of public funds [is] presumed** . . . without showing that the municipality suffered any alleged injury." 18 Eugene McQuillin, the *Law of Municipal Corporations* § 52.26 (3d ed.1993); see 5 Sandra M. Stevenson, *Antieau on Local Government Law* § 73.04[11] (2d

> ed.1999) (stating that where a bid statute has been disregarded, **injury to taxpayers is almost conclusively presumed**). The Missouri Supreme Court went a step further and held, "Even though an expenditure might produce a net gain, if the expenditure is not contemplated by the enabling legislation, **it is illegal and should be enjoined**." *Eastern Missouri Laborers Dist. Council*, 781 S.W.2d at 47.

342 S.C. 515, 524, 537 S.E.2d 299, 303-304 (emphasis added). S.C. Code Ann. § 57-5-1620 specifically enables all Respondents' procurements, and it does not contemplate procurement by any method other than competitive bidding and selection of the lowest bid.

In the case at bar, the Respondents have not complied with the competitive bidding statute. Therefore, the contracts are "unquestionably void," *Pennell & Harley*, 168 S.E. at 191, and "illegal and should be enjoined." *Sloan v. School District,* 342 S.C. at 524, 537 S.E.2d at 304.

CONCLUSION

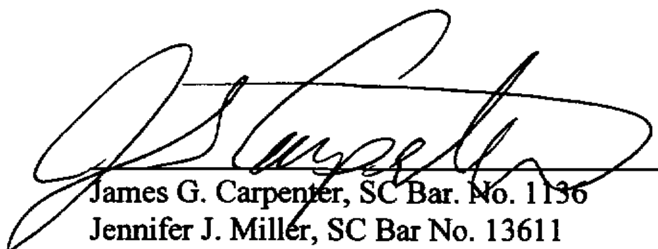
Respondents spent more than $800 million in public funds, using "proposals" when the authorizing statute requires "bids." The public interest of these huge expenditures in violation of the authorizing statute is a sufficient basis to grant Sloan public interest standing to provide future guidance on these issues. A challenge by other proposers is fundamentally different from a taxpayer action, and the lack of such a challenge does not bar Sloan's public interest standing.

Second, Sloan possesses taxpayer standing to challenge the *ultra vires* act. The Court of Appeals limitations on taxpayer standing (the requirement of a constitutional violation, and the *de minimis* rule) would substantially alter the law established by this Court, and sound the death knell for taxpayer standing. Thus, Sloan respectfully petitions the Court to reverse the Court of Appeals' decision on taxpayer standing.

On the merits, Respondents' use of proposals when the statute requires bids is illegal, invalid, and *ultra vires*. This Court should grant Summary Judgment to Sloan on this issue.

At this point, because the contracts have already been awarded, and some have been largely completed, Mr. Sloan is seeking declaratory relief, prospective injunctive relief forbidding these statutory violations in the Respondents' future projects, a remand to the Court of Appeals for a substantive ruling on the bonding issues, and a remand to the Circuit Court for any other appropriate specific remedies as in *Myers v. Patterson.*

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter, SC Bar. No. 1136
Jennifer J. Miller, SC Bar No. 13611
819 East North St., Suite 230
Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3058
Attorneys for the Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case Nos. 00-CP-23-3752, 3753, 4171

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of all others similarly situated,
Petitioner,

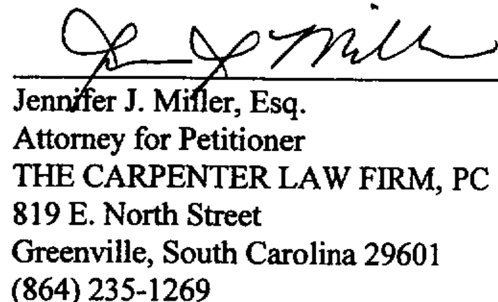
v.

The Department of Transportation, an agency of the State of South Carolina, and the Commission of the Department of Transportation, Robert W. Harrell, John N. Hardee, Eugene Stoddard, F. Hugh Atkins, B. Bayles Mack, L. Morgan Martin, and J.M. Truluck, in their capacities as Commissioners thereof, ...Respondents.

PROOF OF SERVICE

I certify that I have caused to be served three copies of Appellant-Respondent's Final Briefs by United States Mail, first class postage prepaid, on October 1, 2004, addressed to their attorneys of record, William A. Coates, ROE CASSIDY COATES & PRICE, PA at Post Office Box 10429, Greenville, SC 29603 and Franklin J. Smith, Jr., RICHARDSON PLOWDEN CARPENTER & ROBINSON, PA at P.O. Drawer 7788, Columbia, SC 29202.

October 1, 2004



Jennifer J. Miller, Esq.
Attorney for Petitioner
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269